

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WILBER GALLEGOS-DURAN,
Petitioner.

No. 2 CA-CR 2014-0339-PR
Filed November 12, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2007151054001DT

The Honorable Dawn M. Bergin, Judge

REVIEW GRANTED; RELIEF DENIED

Wilber Gallegos-Duran, Florence
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Wilber Gallegos-Duran seeks review of the trial court's order summarily dismissing his untimely notice of and petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and its order denying his motion for rehearing. Although we grant review, we deny relief.

¶2 After a jury trial in 2008, Gallegos-Duran was convicted of sexual conduct with a minor, a dangerous crime against children, involving an eleven-year-old victim. The trial court sentenced him to thirty-five calendar years in prison. We affirmed his conviction and sentences on appeal. *State v. Gallegos-Duran*, No. 1 CA-CR 08-0771 (memorandum decision filed Sept. 29, 2009).

¶3 More than three years after the deadline imposed by Rule 32.4(a), Gallegos-Duran filed a notice of and petition for post-conviction relief alleging his trial counsel had rendered ineffective assistance during plea negotiations. Citing Rule 32.1(g), he argued his claim, although untimely, was permissible because the Supreme Court's decisions in *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), constituted a significant change in the law that, if applicable to his case, would probably overturn his sentence.

¶4 The trial court dismissed Gallegos-Duran's notice and petition, finding, pursuant to Rule 32.4(a), that he had "fail[ed] to state a claim for which relief can be granted in an untimely Rule 32

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proceeding.”¹ The court expressly rejected his argument that his claim was based on Rule 32.1(g) and therefore could be raised in an untimely proceeding, concluding, “*Frye* and *Cooper* did not change the law concerning effective assistance of counsel; they merely applied the right to counsel to a factual context.”

¶5 In a “Motion for Rehearing/Reconsideration,” Gallegos-Duran restated his argument based on Rule 32.1(g), *Frye*, and *Cooper*. He also asserted several claims not stated in his petition, including new claims of ineffective assistance of trial and appellate counsel and the allegation that he “is being held beyond the sentence imposed due to the imposition of an illegal sentence.” He argued this latter claim could be raised in an untimely proceeding because it is grounded in Rule 32.1(d).² He also cited *State v. Vargas-Burgos*, 162 Ariz. 325, 783 P.2d 264 (App. 1989), for the proposition that an “illegal sentence is an issue of subject matter jurisdiction, which can be raised at any time.”

¶6 In ruling on this motion, the trial court declined to reconsider its dismissal of the proceeding, stating Gallegos-Duran had “not set forth any factual or legal basis to support” doing so. Noting that he had also asserted new claims not related to his February 2013 notice of and petition for post-conviction relief, the court construed these allegations as the initiation of a second Rule 32 proceeding. With respect to these new claims, the court again found Gallegos-Duran had “fail[ed] to state a claim for which relief can be granted in an untimely or successive Rule 32 proceeding.” Accordingly, the court denied his motion for rehearing and

¹“Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” Ariz. R. Crim. P. 32.4. As the trial court correctly observed, a claim of ineffective assistance of counsel, standing alone, is grounded in Rule 32.1(a). See *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010).

²Rule 32.1(d) identifies a ground for post-conviction relief when a “person is being held in custody after the sentence imposed has expired.”

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dismissed what it had construed as his second Rule 32 proceeding. This petition for review followed.

¶7 On review, Gallegos-Duran restates the arguments he raised below. He also maintains the trial court abused its discretion in summarily dismissing the new claims he raised in his motion for rehearing—which he characterizes as a “primary notice of post-conviction relief” with respect to those claims—“without allowing cogent presentation of a formal petition.” We review a trial court’s summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶8 The trial court correctly ruled that *Frye* and *Cooper* did not significantly change the law regarding ineffective assistance of counsel. Arizona courts have long recognized a defendant’s right to effective representation during plea negotiations. *See, e.g., State v. Donald*, 198 Ariz. 406, ¶ 11, 10 P.3d 1193, 1198 (App. 2000).³ Thus, *Frye* and *Cooper* do not mark a “transformative event” in the law that would give rise to a claim based on Rule 32.1(g). *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009) (“‘change in the law’” for purpose of Rule 32.1(g) “requires some transformative event, a “‘clear break’” from the past”), *quoting State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).

¶9 The trial court also correctly determined, albeit implicitly, that new claims asserted in Gallegos-Duran’s motion for rehearing were not properly before the court. *See* Ariz. R. Crim. P. 32.9(a); *State v. Bonnell*, 171 Ariz. 435, 438 n.3, 831 P.2d 434, 437 n.3 (App. 1992) (Rule 32 petitioner “could not assert a new claim in the motion for rehearing” but “could do so only by filing another petition”). We believe the best practice in such circumstances is for a trial court simply to decline consideration of matters outside the scope of a petitioner’s challenge to the final decision in his Rule 32

³By referring to his “plea consideration” claim as a “*Donald*-type claim,” Gallegos-Duran implicitly recognizes such a claim was available before the Supreme Court decided *Frye* and *Cooper*.

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proceeding. *See State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991) (“The law is clear that a court will not entertain new matters raised for the first time in a motion for rehearing.”).

¶10 But Gallegos-Duran does not challenge the trial court’s decision to construe this portion of his motion as his “second Rule 32 proceeding”; instead, he maintains the court abused its discretion in dismissing that proceeding, as construed by the court, before his “presentation of a formal petition.” Because the trial court correctly determined the new claims he alleged were grounded in Rule 32.1(a) or (c), they were time-barred and precluded pursuant to Rule 32.2(a)(3); they were therefore subject to dismissal based on a notice of post-conviction relief alone.⁴ Gallegos-Duran was not entitled to file a petition on his claims, all of which were time-barred.

¶11 Although the trial court did not expressly address Gallegos-Duran’s argument that a claim of an illegal sentence may be raised “at any time,” it is of no avail. In *State v. Bryant*, we “conclude[d] that we used the word ‘jurisdiction’ imprecisely” in *Vargas-Burgos*, a case that was heard on direct appeal, not in a post-conviction relief proceeding. 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008) (illegal sentence in *Vargas-Burgos* did not implicate subject matter jurisdiction). The trial court here had jurisdiction to sentence Gallegos-Duran, *see id.*; he has forfeited any challenge to the legality of that sentence by failing to raise it before initiating this untimely post-conviction proceeding, *see* Ariz. R. Crim. P. 32.2(a),

⁴ Like Rule 32.4(a), which limits claims permitted in an untimely proceeding, *see supra* note 1, Rule 32.2 precludes a defendant from raising any claim under Rule 32.1(a), (b), or (c) “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.” Ariz. R. Crim. P. 32.2(a)(3), 32.2(b). And Rule 32.2(b) provides for summary dismissal of an untimely or successive notice of post-conviction relief that fails to include (1) the claimed, “specific exception” to rules of preclusion for waiver or untimely filing and (2) “meritorious reasons . . . substantiating the [non-precluded] claim and indicating why the claim was not stated in the previous petition or in a timely manner.”

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32.4(a); *Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d at 1177, 1180 (claim of illegal sentence subject to preclusion under Rule 32.2(a)(3)).

¶12 Accordingly, review is granted, but relief is denied.